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OCA 87-5979
7 December 1987

OCA FILE

MEMORANDUM FOR: Deputy Director for Administration
Director, Office of Security
C/ALD/OGC
C/ICAD/OGC

STAT FROM: [redacted] Legislation Division
Office of Congressional Affairs

SUBJECT: Senate Polygraph Bill - S. 1904

1. Attached for your information is a copy of S. 1904, ("Polygraph Protection Act of 1987") the Senate version of the recently passed House polygraph bill, H.R. 1212. Also attached are the floor statements of its sponsors upon introduction. As you can see, the bill enjoys bipartisan sponsorship including Senators Kennedy and Hatch, Chairman and Ranking Minority Member, respectively, of the Senate Labor and Human Relations Committee.

2. S. 1904 has been referred to that Committee and the Committee has scheduled a "markup" of the bill for Wednesday, 7 December 1987.

3. Subsections (a) and (b) of Section 7 of the bill address the Agency's concerns in this matter by exempting from the bill's coverage the Federal Government, the Agency, Intelligence Community contractors and their employees (among other exemptions). This exemption is identical to that contained in H.R. 1212 and is the one which the Agency and the Community have supported in previous versions of this legislation.

4. We will continue to monitor the legislation and keep you
STAT advised of developments [redacted]

Attachments:
(1) The bill, S. 1904
(2) Sponsor floor statements

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may be issued without security for the loans.

"(b) The Administration shall report to the interagency working group established under section 209(A) of the Energy Policy and Conservation Act (42 U.S.C. 6276(d)) all loans made under this section.

"(c) For purposes of this section—

"(1) the term 'renewable energy' means any energy resource which has recently originated from the sun, including direct and indirect solar radiation and intermediate solar energy forms such as wind, ocean thermal gradients, ocean currents and waves, hydropower, photovoltaic energy, products of photosynthetic processes, organic wastes, and others; and

"(2) the term 'energy' means includes both mineral and nonmineral fuel resources, including solar, geothermal, fossil, nuclear, electrical, and synthetic fuel energy resources."

(c) FOREIGN ASSISTANCE PROGRAMS.—Section 106(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151d(b)) is amended—

(1) in the second sentence of paragraph (1) by inserting after "suitable energy sources" the following: "(including funds for feasibility studies for renewable energy projects)"; and

(2) by adding at the end the following:

"(3) The agency primarily responsible for administering this part shall develop an information exchange with the renewable energy industry in the United States in order to facilitate the use of renewable energy equipment in countries receiving assistance under this chapter.".

SEC. 5. DISSEMINATION OF INFORMATION; ACCESS TO FOREIGN MARKETS.

Section 250(c)(2)(D) of the Energy Policy and Conservation Act (42 U.S.C. 6276(c)(2)(D)) is amended—

(1) in clause (i) by inserting after "commerce," the following: "and potential end users, including other industry sectors in foreign countries such as health care, rural development, communications, and refrigeration, and others,"; and

(2) in clause (ii) by striking out "export opportunities" and inserting in lieu thereof "export and export financing opportunities".

SEC. 6. AUTHORIZATION OF FUNDS FOR CORRECT DEVELOPMENT OF PROGRAM TO ENCOURAGE USE OF RENEWABLE ENERGY IN OTHER COUNTRIES.

Section 250(d) of the Energy Policy and Conservation Act (42 U.S.C. 6276(d)) is amended—

(1) by inserting "(1)" after "(d)"; and

(2) by adding at the end the following:

"(2) The interagency group shall establish a program to educate other countries in the deregulation of energy markets and to encourage other countries to establish independent power production policies that would allow small power production facilities and facilities which produce alternative forms of renewable energy to compete effectively with producers of energy from nonrenewable sources.

"(3) There is authorized to be appropriated to the interagency working group $2,500,000 for fiscal year 1988 to carry out its activities under this subsection.".

SEC. 7. PROGRAMS IN INTERNATIONAL FINANCIAL INSTITUTIONS.

The Secretary of the Treasury shall instruct the Executive Directors of the International Monetary Fund and the Inter-American Development Bank to urge those respective international financial institutions—

(1) to provide financing for renewable energy purposes as part of their programs for financing energy projects;

(2) to submit to recipient countries plans of those respective institutions for renewable energy development; and

(3) to appoint an officer, or establish an office, for the purpose of facilitating the use of renewable energy technologies in recipient countries.

SEC. 8. ELIGIBILITY OF RENEWABLE ENERGY EQUIPMENT FOR MILITARY ASSISTANCE PROGRAMS.

Section 644(d) of the Foreign Assistance Act of 1961 (22 U.S.C. 2403(d)) is amended by adding at the end the following: "Paragraphs (2), (3), and (4) include renewable energy equipment."

By Mr. KENNEDY (for himself, Mr. HATCH, Mr. PELL, Mr. STAFFORD, Mr. MATSUNAGA, Mr. METZENBAUM, Mr. WEICKER, Mr. DODD, Mr. SIMON, Mr. HARKIN, Mr. ADAMS, and Ms. MIKULSKI):

S. 1904. A bill to strictly limit the use of lie detector examinations by employers involved in or affecting interstate commerce; to the Committee on Labor and Human Resources.

POLYGRAPH PROTECTION ACT

Mr. KENNEDY. Mr. President, today I am joining with Senators HATCH, PELL, STAFFORD, MATSUNAGA, METZENBAUM, WEICKER, DODD, SIMON, HARKIN, ADAMS, and MIKULSKI on the Senate Labor and Human Resources Committee to introduce the bipartisan Polygraph Protection Act of 1987.

The time has come to restrict the massive, unconscionable use of lie detectors in the workplace.

This legislation is a fundamental issue of workers' rights. Last year over 2 million workers were strapped to these inaccurate instruments of intimidation. We know the devices can't be trusted, and it is time to put an end to their unacceptable misuse that unfairly puts so many workers jobs in jeopardy.

The abuse of polygraphs in the workplace has been before Congress for almost 25 years. Scores of bills have been introduced and dozens of hearings held, but we have never taken final action. Meanwhile, the use of the machine has proliferated, especially on the job.

In 1964 a House Government Operations subcommittee reported:

There is no lie detector, neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth from deception.

A decade and a half later, Senator Sam Ervin observed:

A lie detector test to innocent citizens simply wanting a job reverses our cherished presumption of innocence. If an employee refuses to submit to the test, he is automatically guilty. If he submits to the test, he is faced with the burden of proving his innocence.

All of these problems are compounded by the fact that impartial experts have increasingly found that polygraphs have no scientific validity in the overwhelming majority of their applications.

In hearings before the Senate Labor Committee in the last two Congresses, we received strong testimony supporting the conclusion reached in the Office of Technology Assessment's technical memorandum published in 1983:

While there is some evidence for the validity of polygraph testing as an adjunct to criminal investigations, there is very little research or scientific evidence to establish polygraph test validity in screening situations, whether they be preemployment, preclearance, periodic or aperiodic, random or dragnet.

Beginning with Massachusetts in 1969, 21 States and the District of Columbia have restricted or prohibited the use of polygraphs in the workplace. Similarly, the vast majority of courts refuse to admit polygraph tests as evidence of guilt or innocence, due to the documented unreliability of the tests.

Yet the use of these machines has climbed sharply in many jurisdictions in recent years. It is time for Congress to act to protect American employees from the massive misuse of this device which columnist William Safire has called "the most blatant intrusion into personal freedom in this country today".

In the last Congress, the House of Representatives passed Congressman PAT WILLIAMS' private-sector ban on polygraphs, with 5 industry exemptions, by a vote of 226 to 172. The Senate Labor and Human Resources Committee reported out the Hatch-Kennedy bill, with no industry exemptions, by a margin of 11 to 5, with 4 Republicans and 7 Democrats voting to report it favorably. Congress adjourned, however, before full action by the Senate could take place.

On November 4 of this year, the House of Representatives again passed the Williams bill, with only 2 industry exemptions, by an even wider margin of 254 to 158. I am hopeful that the Senate will act promptly on the legislation we are introducing so that this long overdue measure can finally be enacted into law.

The bill we are introducing today is an attempt to balance the interests of employers and employees, based on the known scientific evidence regarding polygraphs and their potential for abuse. It will ban the use of preemployment and random testing, which make up 85 percent of the testing being conducted today and for which there is no demonstrable validity. At the same time, the bill will preserve the ability of employers to investigate specific losses under limited circumstances, and with employee safeguards in place.

Under this bill, no employer can use a polygraph for any preemployment testing of job applicants or random testing of employees. But employers could use the polygraph to investigate specific economic losses, by testing employees who had access to the property under investigation and who they have reasonable suspicion to believe were involved in the incident. The em-

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ployer must file a police report, an insurance claim, a report to a regulatory agency or sign a written statement detailing the basis for the polygraph test, before requesting any employee take a polygraph test. No employee could be disciplined or dismissed for refusing the test or failing the test without additional supporting evidence, and the test could only be conducted under carefully prescribed circumstances.

The bill does not apply to Federal, State, or local governments—because the constitution does. Most public employees are constitutionally protected from polygraph tests, and the courts are increasingly affirming this protection.

On October 28, the Texas Supreme Court unanimously found that the State mental health agency's use of the polygraph "impermissibly violates privacy rights" protected by the State constitution. The court went on to hold that this protection should yield only when the State can show that the intrusion is "reasonably warranted for the achievement of a compelling governmental objective that can only be achieved by no less intrusive, more reasonable means."

Constitutional protections for public employees, however, are not available to private sector employees, and it is in the private sector that action by Congress is essential to safeguard workers' rights.

The principles of this legislation has widespread support from both business and labor. Civil liberties groups and labor organizations have sought legislative protections from the polygraph and support this approach. At a hearing this year, the American Association of Railroads testified in favor of this approach. A number of employer organizations which currently use the test, including the American Association of Railroads, the American Bankers Association, the National Grocer's Association, the National Mass Retailers Institute, the National Retail Merchants' Association, and the Securities Industry Association have endorsed this legislation, and I hope that other users will accept the legislation as properly balancing their interests with those of their employees. I urge the Senate to join in supporting this legislation and expediting its enactment into law.

Mr. President, I ask unanimous consent that the text of the bill may be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1904

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Polygraph Protection Act of 1987".

SEC. 2. DEFINITIONS.

As used in this Act:

(1) COMMERCE.—The term "commerce" has the meaning provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)).

(2) EMPLOYER.—The term "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

(3) LIE DETECTOR TEST.—The term "lie detector test" includes—

(A) any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical, electrical, or chemical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual or for verifying the truth of statements; and

(B) the testing phases described in paragraphs (1), (2), and (3) of section 8(c).

(4) POLYGRAPH.—The term "polygraph" means an instrument that records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards.

(5) RELEVANT QUESTION.—The term "relevant question" means any lie detector test question that pertains directly to the matter under investigation with respect to which the examinee is being tested.

(6) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(7) TECHNICAL QUESTION.—The term "technical question" means any control, symptomatic, or neutral question that, although not relevant, is designed to be used as a measure against which relevant responses may be measured.

SEC. 3. PROHIBITIONS ON LIE DETECTOR USE.

Except as provided in section 7, it shall be unlawful for any employer engaged in commerce or in the production of goods for commerce—

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, dismiss, discipline in any manner, or deny employment or promotion to, or threaten to take any such action against—

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test; or

(B) any employee or prospective employee on the basis of the results of any lie detector test; or

(4) to discharge, discipline, or in any manner discriminate against an employee or prospective employee because—

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act;

(B) such employee or prospective employee has testified or is about to testify in any such proceeding; or

(C) of the exercise by such employee, on behalf of such employee or another person, of any right afforded by this Act.

SEC. 4. NOTICE OF PROTECTION.

The Secretary shall prepare, have printed, and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this Act. Each employer shall post and maintain such notice, in conspicuous places on its premises where notices to employees and applicants to employment are customarily posted.

SEC. 5. AUTHORITY OF THE SECRETARY.

(a) IN GENERAL.—The Secretary shall—

(1) issue such rules and regulations as may be necessary or appropriate to carry out this Act;

(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and

(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this Act.

(b) SUBPOENA AUTHORITY.—For the purpose of any hearing or investigation under this Act, the Secretary shall have the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50).

SEC. 6. ENFORCEMENT PROVISIONS.

(a) CIVIL PENALTIES.—

(1) IN GENERAL.—Subject to paragraph (2)—

(A) any employer who violates section 4 may be assessed a civil money penalty not to exceed $100 for each day of the violation; and

(B) any employer who violates any other provision of this Act may be assessed a civil penalty of not more than $10,000.

(2) DETERMINATION OF AMOUNT.—In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with this Act and the gravity of the violation.

(3) COLLECTION.—Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (e) of section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.

(b) INJUNCTIVE ACTIONS BY THE SECRETARY.—The Secretary may bring an action to restrain violations of this Act. The district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act.

(c) PRIVATE CIVIL ACTIONS.—

(1) LIABILITY.—An employer who violates this Act shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable relief as may be appropriate, including but not limited to employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) COURT.—An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by any one or more employees for or in behalf of himself or themselves and other employees similarly situated.

(3) COSTS.—The court shall award to a prevailing party in any action under this subsection the reasonable costs of such action, including attorneys' fees.

(d) WAIVER OF RIGHTS PROHIBITED.—The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement of a pending action or complaint, agreed to and signed by all the parties.

SEC. 7. EXEMPTIONS.

(a) NO APPLICATION TO GOVERNMENTAL EMPLOYERS.—The provisions of this Act shall not apply with respect to the United States Government, a State or local government, or any political subdivision of a State or local government.

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(b) NATIONAL DEFENSE AND SECURITY EXEMPTIONS.—

(1) NATIONAL DEFENSE.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to—

(A) any expert or consultant under contract to the Department of Defense or any employee of any contractor of such Department; or

(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.

(2) SECURITY.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any intelligence or counterintelligence function, of any lie detector test to—

(A)(i) any individual employed by, or assigned or detailed to, the National Security Agency or the Central Intelligence Agency, (ii) any expert or consultant under contract to the National Security Agency or the Central Intelligence Agency, (iii) any employee of a contractor of the National Security Agency or the Central Intelligence Agency, or (iv) any individual applying for a position in the National Security Agency or the Central Intelligence Agency; or

(B) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for the National Security Agency or the Central Intelligence Agency.

(c) EXEMPTION FOR FBI CONTRACTORS.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under the contract with such Bureau.

(d) LIMITED EXEMPTION FOR ONGOING INVESTIGATIONS.—Subject to section 8, this Act shall not prohibit an employer from requesting an employee to submit to a polygraph test if—

(1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;

(2) the employee had access to the property that is the subject of the investigation;

(3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(4) the employer—

(A) files a report of the incident or activity with the appropriate law enforcement agency;

(B) files a claim with respect to the incident or activity with the insurer of the employer, except that this subparagraph shall not apply to a self-insured employer;

(C) files a report of the incident or activity with the appropriate government regulatory agency; or

(D) executes a statement that—

(i) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees;

(ii) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer;

(iii) is provided to the employee on request;

(iv) is retained by the employer for at least 3 years; and

(v) contains at a minimum—

(I) an identification of the specific economic loss or injury to the business of the employer;

(II) a statement indicating that the employee had access to the property that is the subject of the investigation; and

(III) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

SEC. 8. RESTRICTIONS ON USE OF EXEMPTIONS.

(a) OBLIGATION TO COMPLY WITH CERTAIN LAWS AND AGREEMENTS.—The limited exemption provided under section 7(d) shall not diminish an employer's obligation to comply with—

(1) applicable State and local law; and

(2) any negotiated collective bargaining agreement,

that limits or prohibits the use of lie detector tests on employees.

(b) TEST AS BASIS FOR ADVERSE EMPLOYMENT ACTION.—Such exemption shall not apply if an employee is discharged, disciplined, or discriminated against in any manner on the basis of the results of one or more polygraph tests or the refusal to take a polygraph test, without additional supporting evidence. The evidence required by section 7(d) may serve as additional supporting evidence.

(c) RIGHTS OF EXAMINEE.—Such exemption shall not apply unless the requirements described in section 7 and paragraphs (1), (2), and (3) are met.

(1) PRETEST PHASE.—During the pretest phase, the prospective examinee—

(A) is provided with reasonable notice of the date, time, and location of the test, and of such examinee's right to obtain and consult with legal counsel or an employee representative throughout all phases of the test;

(B) is not subjected to harassing interrogation technique;

(C) is informed of the nature and characteristics of the tests and of the instruments involved;

(D) is informed as to whether—

(i) the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed; or

(ii) any other device, including any device for recording or monitoring the conversation will be used;

(E) is informed of such examinee's privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States;

(F) is provided an opportunity to review all questions (technical or relevant) to be asked during the test and is informed of the right to terminate the test at any time; and

(G) signs a notice informing such examinee of—

(i) the limitations imposed under this section;

(ii) the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this Act; and

(iii) the legal rights and remedies of the employer.

(2) ACTUAL TESTING PHASE.—During the actual testing phase—

(A) the examinee is not asked any questions by the examiner concerning—

(i) religious beliefs or affiliations;

(ii) beliefs or opinions regarding racial matters;

(iii) political beliefs or affiliations;

(iv) any matter relating to sexual behavior; and

(v) beliefs, affiliations, or opinions regarding unions or labor organizations;

(B) the examinee is permitted to terminate the test at any time;

(C) the examiner does not ask such examinee any question (technical or relevant) during the test that was not presented in writing for review to such examinee before the test;

(D) the examiner does not ask technical questions of the examinee in a manner that is designed to degrade, or needlessly intrude on, the examinee; and

(E) the examiner does not conduct a test on an examinee when there is written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the test.

(3) POST-TEST PHASE.—Before any adverse employment action, the employer must—

(A) further interview the examinee on the basis of the results of the test; and

(B) provide the examinee with—

(i) a written copy of any opinion or conclusion rendered as a result of the test; and

(ii) a copy of the questions asked during the test along with the corresponding charted responses.

(d) QUALIFICATIONS OF EXAMINER.—Such exemptions shall not apply unless the individual who conducts the polygraph test—

(1) is at least 21 years of age;

(2) is a citizen of the United States;

(3) is a person of good moral character;

(4) has complied with all required laws and regulations established by licensing and regulatory authorities in the State in which the test is to be conducted;

(5)(A) has successfully completed a formal training course regarding the use of polygraph tests that has been approved by the State in which the test is to be conducted or by the Secretary; and

(B) has completed a polygraph test internship of not less than 6 months duration under the direct supervision of an examiner who has met the requirements of this section;

(6) maintains a minimum of a $50,000 bond or an equivalent amount of professional liability coverage;

(7) uses an instrument that records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards;

(8) bases an opinion of deception indicated on evaluation of changes in physiological activity or reactivity in the cardiovascular, respiratory, and electrodermal patterns on the lie detector charts;

(9) renders any opinion or conclusion regarding the test—

(A) in writing and solely on the basis of an analysis of the polygraph charts;

(B) that does not contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the test; and

(C) that does not include any recommendation concerning the employment of the examinee;

(10) does not conduct and complete more than five polygraph tests on the calendar day on which the test is given and does not conduct any such test for less than a 90-minute duration; and

(11) maintains all opinions, reports, charts, written questions, lists, and other records relating to the test for a minimum period of 3 years after administration of the test.

(e) PROMULGATION OF STANDARDS.—The Secretary shall establish standards governing individuals who, as of the date of the enactment of this Act, are qualified to conduct polygraph tests in accordance with applicable State law. Such standards shall not be satisfied merely because an individual has

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conducted a specific number of polygraph tests previously.

SEC. 9. DISCLOSURE OF INFORMATION.

(a) IN GENERAL.—A person, other than the examinee, may not disclose information obtained during a polygraph test, except as provided in this section.

(b) PERMITTED DISCLOSURES.—A polygraph examiner, polygraph trainee, or employee of a polygraph examiner may disclose information acquired from a polygraph test only to—

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the employer that requested the test; or

(3) any person or governmental agency that requested the test as authorized under subsection (a), (b), or (c) of section 7 or any other person, as required by due process of law, who obtained a warrant to obtain such information in a court of competent jurisdiction.

(c) DISCLOSURE BY EMPLOYER.—An employer (other than an employer covered under subsection (a), (b), or (c) of section 7) for whom a polygraph test is conducted may disclose information from the test only to a person described in subsection (b).

SEC. 10. EFFECT ON STATE LAW.

This Act shall not preempt any provision of any State law that is more restrictive with respect to the administration of lie detector tests than this Act.

SEC. 11. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this Act shall become effective 6 months after the date of enactment of this Act.

(b) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Secretary shall issue such rules and regulations as may be necessary or appropriate to carry out this Act.

Mr. HATCH. Mr. President, the bill we are introducing today is a realistic, equitable solution to the problems generated by the widespread use of polygraph examinations by private employers. The Polygraph Protection Act of 1987 would ban the use of preemployment polygraph exams but would permit regulated tests by all employers in instances involving economic loss or injury to an employer. In other words, the bill attempts to strike a balance between our interest in protecting the rights of working men and women throughout this Nation from being wrongly condemned by a faulty lie detector test and the need of employers to have some tools to combat crime in the workplace.

An extensive scientific and legislative record has been established which indicates that the typical lie detector test given to job applicants cannot predict future performance nor guarantee employee honesty. Moreover, this record indicates that many working men and women are falsely accused of wrongdoing and are permanently stigmatized by the results of one lie detector test. According to Dr. David Raskin, who is a professor of psychology at the University of Utah and a noted expert on polygraph examinations, "Approximately 100,000 to 200,000 people may be mistreated every year because of faulty polygraph examinations." This sorry record must be corrected.

On the other hand, we also have in our country a very real problem with employee theft. Employers feel that the polygraph examination is often the only realistic tool they have to determine, who, among a group of employers, may have stolen or misappropriated business property. They view the examination itself and the threat of an examination as their last line of defense they have against employee theft.

This legislation strikes a balance between these two competing concerns by banning preemployment use of the polygraph, where the possibility for error and misidentification is the highest, but permitting examinations which are conducted in accordance with an ongoing investigation, where the chances for accuracy are much higher. Moreover, there are a variety of legal rights and protections available, both in common law and under the bill, to a current employee given an examination that are not available to a job applicant.

It is interesting to note that several business organizations have endorsed the basic approach taken in this legislation and have been instrumental in helping us fashion a workable solution. I hope that this spirit of cooperation will continue as we move forward on the legislation.

I look forward to working with Senator KENNEDY and the other sponsors to enact the Polygraph Protection Act of 1987 during this Congress. Passage will not be easy, especially given the administration's apparent opposition. But the more than 2 million working men and women who will be given a polygraph examination this year deserve the protections contained in this bill. I urge my colleagues to join us and support his legislation.

● Mr. METZENBAUM. Mr. President, I am pleased to join my colleagues on the Labor and Human Resources Committee, led by the Chairman, Senator KENNEDY, and the ranking minority member, Senator HATCH, as an original cosponsor of the Polygraph Protection Act of 1987.

Our legal system protects citizens subjected to polygraph testing by law enforcement officials; we regulate polygraph testing conducted by the Federal Government; but currently there is no Federal protection for millions of American workers who must take polygraph tests administered by private employers. This bipartisan legislation corrects that situation by eliminating the abuse of polygraph testing in the workplace.

Polygraph tests simply are not accurate "lie detectors." This bill does not ban all uses of polygraphs by private employers. Instead it strikes a balance between the concerns of workers and the interests of employers.

The bill bans polygraph use in the two areas where the results are most suspect: preemployment screening and random postemployment testing. Thus honest job applicants and workers will no longer be forced to take a frightening, unscientific test in order to get or keep a job.

The bill does allow polygraph testing as part of an ongoing investigation where the employer has reasonable suspicion that a particular employee was involved in an internal theft. Under such limited circumstances, polygraph tests can serve as one tool to help reduce the serious problem of internal theft.

It is important to note that this bill treats all employers equally. It is unfair to give a few private special interests exemptions from the limitations on the use of polygraphs—it is unfair to the workers in those select industries and it is unfair to other employers who do not get special treatment.

This carefully crafted bill has the support of labor, civil liberties groups, and a number of business associations, including the American Association of Railroads, the American Bankers' Association, the National Grocers' Association, the National Mass Retailers, the National Retail Merchants Association, and the Securities Industry Association.

I urge all my colleagues to support this legislation.●

● Mr. SIMON. Mr. President, I am pleased today to be counted among the original cosponsors of the Polygraph Protection Act of 1987.

Twenty-one States have either banned or restricted the use of "lie detectors" in the workplace, but the number of Americans who must submit to these tests continues to grow. Working men and women in the private sector are subjected to more than 2 million lie detector tests every year—four times the number given 10 years ago. State lie detector prohibitions have proven inherently inadequate.

The truth is that polygraph tests cannot accurately distinguish truthful statements from lies. The Congressional Office of Technology Assessment has reviewed field studies of polygraph validity and has found that honest people are more likely to fail polygraph tests than dishonest people. The tragedy is that at least 200,000 Americans are wrongfully denied employment opportunities every year—not because of their work records, but rather because employers rely on inaccurate lie detector tests. Honest workers would be better off if their employers made these personnel decisions by simply flipping a coin!

Certainly American workers must be afforded the same protection from polygraph tests which is routinely granted to indicted suspects in criminal proceedings. These people cannot be forced to take polygraph tests, and even the Justice Department opposes the use of polygraph examination results in criminal trials as evidence of

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guilt or innocence. Yet many employees and job applicants can be forced to take lie detector tests for any reason whatsoever.

Mr. President, this bill will prohibit the use of preemployment polygraph tests—the area of greatest abuse of applicants' rights by potential employers. It does not, however, prohibit the use of polygraph tests completely. If a loss report has been filed with a Federal agency or an insurance company, a detailed written statement has been made of the loss by an employer, or the police and a complete investigation has been made leading to certain, specified suspects, the polygraph may be used under certain restrictive circumstances. This, Mr. President, is certainly an equitable procedure for dealing with polygraph testing. We must address the problem of abuse here, and I would hope that many of my colleagues will agree with me and cosponsor this bill.●

By Mr. D'AMATO (for himself and Mr. CRANSTON):

S. 1905. A bill to enhance competition in the financial services sector, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

DEPOSITORY INSTITUTION AFFILIATION ACT

Mr. D'AMATO. Mr. President, during my tenure in the Senate, I have been a member of the Senate Banking Committee. As a member of that committee I have listened to hours of testimony and debate regarding the need to modernize the financial regulatory structure of this country. Despite the exhaustive debate and the committee's deliberations on the topic of regulatory reform of the financial services industry, a proposal for truly comprehensive reform which I could support has failed to materialize. For this reason, my good friend and colleague Senator CRANSTON and I have determined to introduce the Depository Institution Affiliation Act.

The Depository Institution Affiliation Act evolved from our consideration of the Competitive Equality Banking Act [CEBA] which was signed into law earlier this year. Despite repeated attempts to achieve a progressive reform of our banking laws, the Competitive Equality Banking Act has regrettably achieved more renown for its anti-competitive provisions rather than the many beneficial provisions contained in that legislation. The two most notoriously anti-competitive provisions of that bill are the restrictions imposed upon non-bank banks and the moratorium imposed upon the Federal Reserve's and the Comptroller's ability to grant expanded underwriting powers to bank holding companies. The moratorium contained in CEBA was an outgrowth of the desire constantly expressed by the members of the Banking Committee and the Senate to have time to consider a proposal which would restructure and streamline the overall structure of our financial services system.

At that time a moratorium was chosen as the only means which could afford the committee time to consider comprehensive rather than piecemeal reform. Further, the moratorium offered a mechanism through which we could avoid the usurpation of our legislative function through the use of novel and tortured interpretations of the Glass-Steagall and Bank Holding Company Acts by the loophole lawyers housed in the Fed and the Comptroller's offices.

The time needed to consider a comprehensive reform package is running out of time because the moratorium expires on March 1, 1988. At the time we chose to impose a moratorium on the regulators, the committee members pledged to reconsider the interrelationships of all the entities that make up our financial system. The realization of this objective will not be accomplished by debating a series of narrowly crafted amendments to the Glass-Steagall Act which fail to address all of the fundamental question involving a wide range of possible affiliations with federally insured depository institutions.

To date, none of the proposals before the Banking Committee addresses these fundamental questions in a manner sufficiently comprehensive to gain my support. Rather than be viewed as mere critics of the efforts of my colleagues, Senator CRANSTON and I have determined that a proposal which is truly comprehensive in its approach should be set before the committee for its consideration during the Banking Committee hearings that began this morning.

We believe that the Depository Institution Affiliation Act represent a truly comprehensive approach. The Depository Institution Affiliation Act is comprehensive legislation designed to:

First, expedite the move toward functional regulation of the financial services industry and thereby enhance the safety and soundness of federally insured depository institutions and the stability of the Nation's financial system;

Second, enhance the quality of regulation and supervision of financial intermediaries;

Third, ensure the availability of innovative financial products and services resulting in greater efficiency and additional consumer benefits in the domestic financial services marketplace;

Fourth, attract more capital to the financial services industry which will enable U.S. firms to compete more effectively in the international marketplace; and

Fifth, create an alternative regulatory system that would allow any type of business to engage in insurance, banking, securities, and real estate and other financial services activities.

By introducing this legislation, I would like to acknowledge the efforts of some of my other colleagues on the committee to achieve comprehensive reform. For example, in statements accompanying the introduction of the Financial Services Oversight Act, it appears that the sponsors of that legislation, Senators WIRTH and GRAHAM, share many of Senator CRANSTON's and my ultimate goals. In addressing the proposals which would effectuate the reform of financial services regulation, Senator WIRTH articulated the central issue confronting the committee:

Many of the legislative proposals discussed to date focus only on expanded powers in the financial markets. The primary issue, however, is not one of which powers to grant which financial institution. Rather, we need to put into place a farsighted structure to oversee these markets as they evolve and change in a dynamic international financial arena.

We are faced today with an antiquated financial infrastructure—resembling a Model T automobile—that is forced to travel on a modern electronic highway. Our public section Model T cannot keep up with our domestic private sector. As a result, our domestic financial markets are at a distinct disadvantage with our international competitors.

The bill which I introduce today goes one step further than the reform envisioned by Senators WIRTH and GRAHAM. While it creates streamlined, functionally oriented regulatory system, it permits any type of business to engage in any type of financial service activity through the creation of a depository institution holding company, provided that the holding company and its affiliates comply with the additional statutory safeguards required by this act. I believe this additional step is needed to increase the flow of capital into the banking and securities industries.

If one accepts the arguments of the banking industry and the Comptroller of the Currency regarding the declining profitability of banks and the need to compete with foreign institutions (especially the Japanese), the grant of a few powers to the banks will not return them to the status of increasing profitability or enhance their competitive status vis-a-vis the big Japanese and other foreign banks. Therefore, we have incorporated into the DIAA some of the recommendations contained in the report of the Federal Depository Insurance Corporation entitled: "Mandate for Change, Restructuring the Banking Industry."

In putting forth this legislative proposal, the paramount public policy implication which guided our efforts was the enhancement of the safety and soundness of the financial services system—especially the banking and S&L systems which have yet to weather fully the Third World debt, farm loan, energy loan and real estate loan crises.

Therefore, the restructuring contemplated in this bill will be accompa-

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